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COMMISSION ON HUMAN RIGHTS
Fifty-second session

Open-ended Intersessional working group
on a draft United Nations
declaration on the rights
of indigenous peoples

First session,
20 November-1 December 1995

Provisional agenda

1. Election of officers

2. Adoption of the agenda

3. Organization of work

4. Consideration of a draft United Nations declaration on the rights of indigenous peoples

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Fifty-second session

Open-ended inter-sessional working group
established in accordance with
Commission on Human Rights
resolution 1995/32 of 3 March 1995

First session,
20 November-1 December 1995

Agenda

1. Election of officers

2. Adoption of the agenda

3. Organization of work

4. Consideration of the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled draft "United Nations declaration on the rights of indigenous peoples"

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COMMISSION ON HUMAN RIGHTS
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Item 4 of the provisional agenda

Open-ended inter-sessional working group on
a draft United Nations declaration on
the rights of indigenous peoples
First session
20 November-1 December 1995

CONSIDERATION OF A DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Information received from Governments

Introduction

1. In its resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided to establish an open-ended inter-sessional working group of the Commission on Human Rights to elaborate a draft declaration, considering the draft contained in the annex to resolution 1994/45 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled "Draft United Nations declaration on the rights of indigenous peoples". In the same resolution, the Commission requested the Secretary-General to invite Governments, intergovernmental organizations, non-governmental organizations in consultative status with the Economic and Social Council and organizations of indigenous people authorized to participate to submit, for consideration by the Working Group, comments on the draft declaration submitted by the Sub-Commission. The Economic and Social Council in its resolution 1995/32 of 25 July 1995 authorized the establishment of the working group.

2. The present document contains information received from Governments. Further information will be made available in addenda to this document.

ARGENTINA

[Original: Spanish]
[3 August 1995]

1. In accordance with the invitation by the Secretary-General of the United Nations, under the terms of paragraph 8 of Commission on Human Rights resolution 1995/32, the Argentine Government has the honour to submit to the Assistant Secretary-General for Human Rights a number of comments on the draft United Nations Declaration on the Rights of Indigenous Peoples, approved on 26 August 1994 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

2. The Argentine Government hopes thereby to express its support for the important task entrusted by that resolution to the open-ended Working Group on the draft Declaration and to contribute to its success.

3. Of course, the present submission is in no way intended to exhaust the treatment of the subject, nor to cover in full the broad range of questions arising from a reading of the draft Declaration, nor is it intended to deal with matters of drafting or of form. For that reason, the fact that certain articles or paragraphs are not cited should not necessarily be interpreted as an acceptance of their content. The comments that follow are for the most part limited to pointing out those provisions of the draft which appear to be contrary to basic principles of the Argentine institutional system, or the scope of which might cause them to conflict with those principles if it is not adequately defined.

4. In the first place, it should be pointed out that many of the principles envisioned by the draft have already been incorporated both into legislation and into the constitutional law of several provinces and of the State. In particular, the constitutional reform of August 1994, in enumerating the powers of the Argentine Congress, expressly recognizes the ethnic and cultural pre-existence of the Argentine indigenous peoples and guarantees respect for their identity and the right to a bilingual and intercultural education; it also recognizes the legal personality of their communities and the community ownership and possession of the lands they traditionally occupy, with the legislative branch being empowered to regulate the handing over of other lands suitable for human development, and establishes that none of those lands shall be alienable, transferable or subject to charges or seizure. The same provision states that their participation in the management of their natural resources and other matters that may affect their interests must be ensured, and adds that the powers enumerated therein may be exercised concurrently by the provinces.

5. Within this constitutional framework, and within the framework deriving from the fundamental rights and guarantees enshrined in the Argentine Constitution for all inhabitants of the country, the following observations bear mention.

Self-determination (art. 3)

6. The Argentine Government does not consider the wording of this article acceptable, nor does it consider acceptable the other implicit references to the "right of self-determination" elsewhere in the draft text. It believes that recognition of this right in favour of indigenous peoples, simply because they are indigenous peoples, is nowhere supported by the practice of States or by current international law. General Assembly resolution 1514 (XV), entitled Declaration on the Granting of Independence to Colonial Countries and Peoples, the language of which is reproduced in part in article 3 of the draft, refers to the "subjection of peoples to alien subjugation, domination and exploitation". Therefore, it is those "peoples" whose right "freely [to] determine their political status" is recognized. Obviously, when a State has a Government that represents all of its people, including in this case indigenous populations, there is no such domination, and therefore the right of self-determination does not apply. Furthermore, as stated in General Assembly resolution 2625 (XXV), the exercise of that right is not absolute but is limited by the greater necessity of safeguarding national unity and the territorial integrity of the State.

7. In any event, it is felt that, if the term "peoples" is to be used instead of "populations", a paragraph should be included to define its scope. As to the use of the term "territories" in several passages of the draft, it is not considered acceptable, as it is applicable exclusively to States and therefore not applicable in the present context.

8. For the foregoing reasons, it is proposed that the following language should be added to the preamble: "Conscious of the fact that nothing in the present Declaration shall be construed or used to undermine wholly or in part, the national unity and territorial integrity of a State". An operative paragraph should also be added, which would state that "any attempt to undermine, wholly or in part, the national unity and territorial integrity of a country is incompatible with the present Declaration".

Defence (military obligations) (art. 11, subparagraph (a))

9. Article 21 of the Argentine Constitution states that "Every Argentine citizen is obliged to bear arms in defence of his country and of this Constitution".

10. There is currently no compulsory military service in Argentina. However, in the event of armed conflict or national emergency, it is not possible to make distinctions with respect to the above-mentioned constitutional obligation.

Cultural, spiritual and religious customs and traditions (arts. 12, 13 and 14)

11. The Argentine Republic is peopled by individuals of different origins and has a tradition of respect for ethnic and cultural pluralism, based furthermore on specific constitutional guarantees. Respect for and protection of the cultures and traditions of indigenous communities is a part of official government policy and is reflected in domestic law. It is, however, understood that there are limitations to this principle in cases where the

practice of such usages, customs and traditions might endanger the life, health, morals of the population, or public order, in accordance with the provisions of the laws in effect for the entire national community. Likewise, it should be pointed out that the restitution of cultural, intellectual, religious and spiritual property cannot be an absolute right, since much of this property has become a part of the common heritage of society and cannot be the exclusive property of individuals or groups of individuals. The use of the word "right" should be avoided in cases where, as in the present instance, the concept corresponds more to a general objective or aspiration, the fulfilment of which must take into account the existence of the rights of third parties and, fundamentally, the interests of society in general.

12. With regard to the provision of interpretation in political, legal and administrative proceedings called for under article 14, the fact that there might be practical constraints in fulfilling the terms of this provision should be envisaged and its scope limited.

Education (art. 15)

13. The Argentine Constitution has established the right of indigenous peoples to a bilingual and intercultural education. None the less, it should be understood that this principle does not absolve the State from its responsibility to devise general education plans and to oversee the educational system. Accordingly, the right of indigenous populations to create and supervise their own educational systems and institutions must be conditional upon the fulfilment of the relevant obligations imposed by national law, in accordance with the Constitution. Similarly, the second paragraph of article 15, which appears to impose upon States the obligation to provide education to children living outside their communities in their own culture and language, may in most cases result in a standard which it is impossible to apply in practice.

Participation in decision-making in matters which may affect them (arts. 19 and 20)

14. The principle of the participation of indigenous peoples in the handling of issues which may affect them is enshrined in the Argentine Constitution, which, as has already been seen, includes among the responsibilities of Congress the task of guaranteeing indigenous peoples participation in the management of their natural resources and other interests which may affect them. Nevertheless, it is felt that the lack of precision in the drafting of articles 19 and 20 of the draft Declaration might give rise to incompatibilities in relation to other provisions of the Constitution. For example, the right of indigenous peoples to "participate fully ... at all levels of decision-making" (art. 19), "through procedures determined by them" (art. 20), as well as the obligation to obtain the consent of the peoples concerned before adopting and implementing legislative or administrative measures that may affect them (art. 20, second paragraph), appear incompatible with the constitutional provisions governing election to Congress, with the procedures for drafting and approving laws and decrees, and with other provisions concerning the institutional structure of the country.

15. The foregoing comments can also be applied to the wording of articles 23, 24, 30 and 31, which contain principles of self-government that might conflict with constitutional norms, at both the federal and provincial levels.

Spiritual and material relationship with lands, air, waters, etc. (arts. 25 and 26)

16. Owing to their broad scope and imprecision, the provisions of these articles would also conflict with clearly stated constitutional principles.

Indigenous citizenship (art. 32)

17. It is inappropriate to use the term "citizenship" to describe an individual's belonging to an indigenous community, as it has a precise legal meaning. Furthermore, it is understood that citizenship is obtained, not upon consent of the individual, but because of the fact that he belongs to a given State, a condition which cannot be attributed to indigenous populations. With respect to article 5, which states that "Every indigenous individual has the right to a nationality", it should refer to "the nationality of the State in which he or she lives". It should be noted that the Argentine Constitution guarantees this right to all inhabitants of the national territory.

Juridical procedures and practices (arts. 33 and 39)

18. References to indigenous "legal systems" are deemed to be contrary to basic principles of the Argentine legal and institutional system, such as equality before the law, the independence of the judiciary, the right to defence by trial and to due process, and other fundamental guarantees contained in article 18 of the Constitution. In this context, it is also necessary to clarify the scope of article 34 of the draft text, under which indigenous peoples "have the collective right to determine the responsibilities of individuals to their communities".

Treaties, agreements and "constructive arrangements" (art. 36)

19. In addition to the imprecise wording of this article, the Government considers that in the last instance it implicitly calls into question the overall stability of the State concerned, in so far as its retroactive effect on the validity of such agreements may have direct consequences on, among other things, the administrative structure of State territory.

General observations

20. The Argentine Government recognizes the difficulty in drafting a declaration that can apply to a very broad range of situations, which involve different communities grouped together under the general heading of "indigenous peoples", a term repeated throughout the draft declaration but for which no apparent attempt is made to provide a definition. The Government wishes, however, to express its concern at the tendency in several passages of the text to make a distinction between indigenous reality and that of the rest of the nation, of which the indigenous reality is also a part. In that regard, Argentina hopes that a text can be achieved which, without denying the

legal and political context in which these peoples are interacting, contains the necessary provisions for protecting their sociocultural identity and ensuring them full enjoyment of human rights without any form of discrimination.

CHILE

[Original: Spanish]
[2 August 1995]

1. Chile has attached great importance to the indigenous question since the advent of the democratic regime in 1990. This has been expressed at the national level in the approval of an Indigenous Act intended to stimulate the historical and cultural identity and development of the Chilean indigenous peoples, and also in general government policies with the same objectives. It has also been manifested in the international sphere by the constant support of the Government of Chile for the promotion of specific human rights instruments on behalf of indigenous peoples throughout the world, as well as mechanisms for international cooperation that can make an effective contribution to their development in the framework of the nation States of which they are an integral part.

2. Accordingly, the Government of Chile attaches great importance to the preparation of a United Nations declaration on the rights of indigenous peoples. With regard to the draft submitted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, the Government of Chile wishes to make the following preliminary observations, which might help the open-ended Working Group established for that purpose by the Commission.

3. First of all, it considers that the discussions of the Working Group should be based solely on the text approved and proposed by the Sub-Commission. That is, of course, without prejudice to any amendments, deletions or additions resulting from the discussion to be held by the Group. This position is based on the fact that the draft approved by the Sub-Commission is the fruit of more than 10 years' work in which numerous experts, indigenous organizations and human rights non-governmental organizations with consultative status have participated. Therefore, the Government of Chile considers that this text is all the more deserving of being the sole basic text to serve as a starting point for the Working Group's discussions.

4. Secondly, the Government of Chile feels that the work of putting the final touches to the text proposed by the Sub-Commission should be guided by the objective of making it as compatible as possible with International Labour Organization Convention No. 169 concerning indigenous and tribal peoples in independent countries, adopted in 1989. This instrument constitutes the most recent guidelines approved by the international community and reflects an attitude of respect for those peoples, countering the assimilationist conceptions that held sway on this subject for so long.

5. In the same vein, the Government of Chile feels it is appropriate to use the word "peoples" rather than "populations" in the title of the

United Nations Declaration. As in Convention No. 169, one would have to stipulate that "The use of the term 'peoples' ... should not be construed as having any implications as regards the rights which may attach to the term under international law."

6. In addition, in order to achieve the greatest possible consistency with the Convention, the Government of Chile is of the opinion that, in place of the phrase "right of self-determination" or "autonomy" of indigenous peoples, the most appropriate wording might be "the right to special political representation with regard to the specific affairs of those peoples or matters which may affect their development". That representation would constitute a guarantee for the respect of their social and cultural identity, including their own customs, traditions and institutions, within the framework of the general political norms of the nation State and of respect for the fundamental human rights of each and every one of the individuals who make up these indigenous peoples.

7. Lastly, the Government of Chile generally agrees - and this view is consistent with ILO Convention No. 169 - on the emphasis given in the draft Declaration to the rights of those peoples to obtain preferential attention from nation States to their economic, social and cultural demands, given the centuries-old disregard to which they have been subjected as a result of the assimilationist policies that sought to do away with their specific identities as peoples or, at best, to respect some of their forms of social organization but in a context of marginalization and extreme poverty, given the lack of any significant State policies to provide the financial and technical support needed to overcome their diminished circumstances.

CHINA

[Original: Chinese]
[No date]

1. The Chinese Government has carefully studied Commission on Human Rights resolution 1995/32 and the draft United Nations declaration on the rights of indigenous peoples. It has the following remarks to make on the question of the Commission establishing a provisional working group to work on the draft declaration.

2. Human Rights Fact Sheet No. 9 "The rights of indigenous peoples", published by the Centre for Human Rights, says that indigenous persons "are so called because they were living on their lands before settlers came from elsewhere; they are the descendants - according to one definition - of those who inhabited a country or a geographic region at the time when peoples of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means".

3. The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world. Because of those policies, many indigenous peoples were dispossessed of their ancestral homes and lands, brutally oppressed, exploited and murdered, and in some cases even deliberately exterminated. To this day, many indigenous peoples still suffer from discrimination and

diminished status, and they cannot in fact exercise on an equal footing or to the full the economic, social, cultural, civil and political rights enjoyed by other citizens of the countries where they live.

4. As in the majority of Asian countries, the various nationalities in China have all lived for aeons on Chinese territory. Although there is no indigenous peoples' question in China, the Chinese Government and people have every sympathy with indigenous peoples' historical woes and present plight. China believes it absolutely essential to draft an international instrument to protect their rights and interests. It will play an active part in the provisional working group drafting such an instrument, and hopes it will be able to make a contribution to the draft declaration.

5. The special historical misfortunes of indigenous peoples set them apart from minorities nationalities and ethnic groups in the ordinary sense. For this reason, the draft declaration must clearly define what indigenous peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled. In the materials it prepared for the World Conference on Human Rights, the Centre for Human Rights presumptuously categorized ordinary minority nationalities in many Asian countries as "indigenous peoples" and refused, despite collective and individual clarifications from the Asian countries, to rectify its mistake. This example amply demonstrates the necessity of an established definition of an indigenous people.

6. Article 8 of the present draft United Nations declaration on the rights of indigenous peoples opens: "Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such." This is logically circular reasoning. Not only can it not serve as a basis for identifying indigenous peoples, it may also lead to unnecessary confusion.

7. The Chinese Government believes that Fact Sheet No. 9 mentioned above might serve as the foundation for the definition of an indigenous person in the United Nations declaration. First, it clearly reflects the characteristics of indigenous peoples, and is scientific; second, since these characteristics are objective, they can be used in practice to determine whether or not a community is an indigenous people - they are serviceable. Lastly, this definition corresponds to the view currently most widely accepted in academic circles.

8. Until a clear definition of indigenous peoples has been established, the Chinese Government, cannot formulate specific opinions on individual clauses of the draft declaration, but only express views in principle on the contents. It believes that regard must be had, in the formulation of the various rights of indigenous peoples, to the fact that they are not the same as the "historical rights" of ordinary minority nationalities or ethnic groups, and that indigenous peoples live outside sovereign States. Every effort must be made to consider both, in order to balance the two.

FINLAND

[Original: English]
[10 August 1995]

1. The Government of Finland considers the elaboration and adoption of a declaration on indigenous peoples to be an important step in the evolution of international human rights standards. Finland maintains its position as being one of the Governments that have an indigenous people (the Sami) within its territory and that support the adoption of the declaration.

2. As for the time-frame for the final adoption of the declaration, the Government of Finland is of the opinion that all efforts should be taken for the adoption of the declaration during the first half of the International Decade of the World's Indigenous People.

3. In this connection, the Government of Finland wishes to inform the Secretary-General of new domestic developments in the field of the legal protection of the indigenous Sami people in Finland. On 1 August 1995, a new chapter II of the Finnish Constitution Act entered into force. According to new section 14, paragraph 3, of the Constitution Act, the Sami as an indigenous people shall have the right to maintain and develop their own language and culture. The provision also constitutionally ensures that the right of the Sami to use the Sami language before the authorities shall be prescribed by an Act of Parliament.

4. Another constitutional amendment protecting the cultural autonomy of the Sami as an indigenous people, in relation to their own language and culture, has also been adopted by Parliament and ratified by the President of the Republic. It will enter into force on 1 January 1996. In the same connection the existence and operation of the Sami Parliament will be regulated by an Act of Parliament.

5. The Government of Finland has transmitted the request of the Secretary-General also to the Finnish Sami Parliament. The comments by the Sami Parliament are submitted below.

Comments by the Finnish Sami Parliament

General comments

1. The international community has in the past few years increasingly taken notice of the situation of indigenous peoples and of the need to improve it. To our satisfaction we notice that Finland has recently made two amendments to the Finnish Constitution concerning the Sami. In connection with the revision of chapter II of the Constitution Act of Finland the right of the Sami as an indigenous people to maintain and develop their own language and culture was recognized (sect. 14, para. 3). The Constitution Act (new sect. 51 (a)) furthermore guarantees the Sami as an indigenous people the right to cultural autonomy within their homeland in matters regarding their language and culture.

2. However, the Member States concerned have not yet guaranteed the status of the indigenous peoples so that these peoples in the future could possess and use their territories on their own terms and live in these territories in conformity with their own culture, identity and ways of life. The Sami Parliament therefore hopes that the United Nations will proclaim the declaration on the rights of indigenous peoples as soon as possible.

Draft declaration

3. In its earlier comments the Sami Parliament has expressed its wish that the declaration include a recommendation for the States concerned to employ officials who know the language of indigenous peoples (part III, art. 14). The Sami Parliament repeats this wish once more.

4. The Sami Parliament is of the opinion that the points of view of the Finnish Sami regarding all other details will be best taken into account if a representative of the Sami Parliament participates as before in the preparation of the draft declaration as a member of the delegation of the Finnish Government.

NEW ZEALAND

[Original: English]
[7 August 1995]

1. New Zealand welcomes the decision of the Commission on Human Rights to establish an open-ended intergovernmental working group to elaborate a draft declaration, considering the draft text which has been developed by the Working Group on Indigenous Populations. The Working Group on Indigenous Populations has made a valuable contribution to the development of this draft and Governments now need to maintain the momentum developed by this Working Group and to build on its work, using the draft as the basis for the elaboration of an appropriate and universally applicable declaration.

2. New Zealand looks to the new intergovernmental group to give careful and serious consideration to the draft. It encourages Governments to keep in mind the end goal of adoption by the United Nations General Assembly of an appropriate declaration.

3. New Zealand believes that an appropriate declaration should give recognition to the specific situations of indigenous people, and contribute to ensuring that they have the freedom and security to maintain their own identities, cultures and ways of living. The instrument is intended to define and provide appropriate recognition and protection for the rights of indigenous people. There are a variety of complex issues involved, but New Zealand looks to the good will of all to ensure that our shared goal of adopting a new standard-setting instrument for indigenous people's rights is achieved.

4. New Zealand also wishes to comment on the importance it attaches to the ongoing involvement of indigenous people in the process of elaborating a declaration, in accordance with the procedure adopted by the Commission on Human Rights and recently approved by the Economic and Social Council. The Centre for Human Rights - the United Nations Secretariat are encouraged to charge themselves with overseeing the necessary mechanisms for ensuring expeditious consideration of all eligible and interested indigenous people's groups who have applied to attend the first session of the intergovernmental working group.

UKRAINE

[Original: Russian]
[1 August 1995]

1. Consideration of the United Nations draft declaration on the rights of indigenous peoples has revealed a number of ambiguities, as well as provisions that are at variance with Ukrainian law.

2. First and foremost, the meaning of the terms "indigenous people" and "indigenous community or nation" (art. 9 of the draft declaration) is open to question. As no definition of such concepts is to be found in Ukrainian law, a section providing an interpretation of these terms should be included in the draft declaration.

3. Article 3 should be supplemented as follows: after the words "and cultural development" add the words "If an indigenous people exercises the right of self-determination within the boundaries of an already existing State, the political, economic and social institutions established by it (the indigenous people) shall be compatible with the general legal order of that State."

4. The vagueness of the terms used and the inexactness which may be felt in the translation of the draft declaration make it difficult to understand the content of some articles (art. 6, art. 14, para. 2, arts. 21, 28, 34, 39, etc.).

5. It should be noted that the draft declaration contains provisions which are not consistent with Ukrainian law. For example, article 11, paragraph 1, states the right of indigenous peoples to special protection and security in periods of armed conflict. This establishes privileges for indigenous peoples on ethnic grounds over other peoples and is contrary to articles 32 and 34 of the Constitution of Ukraine.

6. Furthermore, where representatives of indigenous peoples are Ukrainian citizens, article 11, paragraph 2 (a), is in conflict with article 61 of the Constitution of Ukraine and with article 1 of the Ukrainian Law on Universal Military Duty and Military Service, which states that military service in the Armed Forces is an honourable duty of Ukrainian citizens.

7. Article 32, paragraphs 1 and 2, refers to the collective right of indigenous peoples to determine their own citizenship in accordance with their customs and traditions. This provision is at variance with article 31 of the Constitution of Ukraine and with article 2 of the Law on Citizenship of Ukraine, which contains an exhaustive classification of persons who are Ukrainian citizens.

8. The text of the proposed draft declaration therefore requires substantial changes and additions, taking into account the above comments and suggestions, and needs to be made consistent with Ukrainian law.